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# Cases, Regulations, and Statutes

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or other purposes. Hawes v. Kansas Farm Bureau, 238 Kan. 404 (1985).

[32] A model statutory form is typically provided for the declaration. *See, e.g.,* Kan. Stat. Ann. § 65-28,103. Also, under the common statutory provision, if the declarant is competent, the declarant's express desires, if in conflict with the declaration, control. See, e.g., Kan. Stat. Ann. § 65-28, 106. That is an important point to clarify for clients.

[33] Counsel should carefully study the state law requirements that must be satisfied to trigger the agent's authority to act under the DPAHC, and whether the agent has the authority to invalidate a previously existing declaration (Living Will) of the client. In the usual situation, the agent will not have the power to revoke a previously existing declaration. That could result in the DPAHC being inconsistent with the declaration. In that event, counsel should consider advising the client to revoke the declaration.

[34] Thus, a DPAHC is a philosophically neutral document that lets the principal decide appropriate medical treatment based on the principal's own value system. Importantly, language in a DPAHC could be included that would trigger the agent's authority to act on a medical finding that the principal's death is imminent and that the continuation of artificial means of life support (with nutrition and hydration specifically not defined as artificial life support) would only prolong the principal's inevitable death.

[35] 497 U.S. 261 (1990).

# CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

## ANIMALS

**CATTLE**. The plaintiff owned an irrigated corn field which adjoined the defendant's land. The properties were separated by a "lawful fence" and a one-wire electric fence; however, the defendant's cattle broke through the fence and spread out over the irrigated field which had immature corn growing on it at the time. Although the defendant agreed to pay for the damage to the crop, a fertilizer tank and the loss of fertilizer, the parties disagreed as to the measure of damages. The plaintiff argued that the damages were calculated by comparing the yield of the non-damaged crops and the yield of the damaged area. The plaintiff harvested the areas separately and measured the difference in yield to support its damage claim. The trial court allowed the plaintiff damages only for the cost of rent of a pasture for one day because it found that the plaintiff failed to prove the loss of value of the crop on the day the damage occurred, not later when the crop was harvested. The appellate court held that the proper measure of damages was the difference in yield reduced by any reduced costs. Because the plaintiff continued to irrigate, fertilize and harvest the entire field, the costs were not reduced by the damage; therefore, the damages were equal to the loss of yield in the damaged field. **Harsh v. Cure Feeders, LLC, 2005 Colo. App. LEXIS 842 (Colo. Ct. App. 2005)**.

## FEDERAL AGRICULTURAL PROGRAMS

**CROP INSURANCE**. The plaintiffs were Texas, Georgia, Alabama, Florida, and South Carolina peanut farmers who insured their 20 01-2002 peanut crops under Multiple Peril Crop Insurance ("MPCI") policies. The plaintiffs' crops suffered weather-related damage in 2002 and the plaintiffs filed insurance claims for the losses. The loss claims were allowed using the non-quota peanut per-pound coverage rate of $0.1775 as provided under the 2002 Farm Security and Rural Investment Act, *Pub. L. No. 107-171, 116 Stat. 182 (2002)*. The 2002 removed the distinction between quota and non-quota peanuts and set the rate at $0.1775 per pound. The plaintiffs sued in the Court of Federal Claims for breach of contract in that the insurance policies were formed when the coverage rate for quota peanuts was $0.31 per pound. The court dismissed the case for lack of jurisdiction and refused to transfer the case to the Federal District Court. The plaintiffs argued that the Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), because the suit did not name the FCIC as a defendant. The court rejected this argument because the FCIC was the true defendant in this case because the crop insurance policies are between the FCIC and the plaintiffs. However, the court held that the case should have been transferred to the Federal District Court because the failure to transfer caused the loss of the claims due to a statute of limitations and because the transfer would not prejudice any party or unduly burden the courts. **Texas Peanut Farmers v. United States, 2005 U.S. App. LEXIS 9881 (Fed. Cir. 2005)**.

**IRRADIATION OF FRUITS AND VEGETABLES**. The APHIS has issued proposed regulations to revise the approved doses for irradiation treatment of imported fruits and vegetables. This proposed regulations establish a new minimum generic dose of irradiation for most arthropod plant pests, establish a new minimum generic dose for the fruit fly family, reduce the minimum dose of irradiation for some specific fruit fly species, and add nine pests to the list of pests for which irradiation is an approved treatment. In addition, the proposed regulations provide for the irradiation of fruits and vegetables moved interstate from

Hawaii, Puerto Rico and the U.S. Virgin Islands at the pest-specific irradiation doses that are now approved for imported fruits and vegetables. The proposed regulations add irradiation as a treatment for bananas from Hawaii and to add vapor-heat treatment as an optional treatment for sweet potatoes from Hawaii. **70 Fed. Reg. 33857 (June 10, 2005)**.

**PINE SHOOT BEETLE**. The APHIS has issued proposed regulations which amend the pine shoot beetle regulations to allow pine bark products to be moved interstate from quarantined areas during the shoot feeding stage (July 1 through October 31) of the pine shoot beetle's life cycle without treatment. The proposed regulations also establish a management method to allow pine bark products to be moved interstate from quarantined areas during the overwintering stage (November 1 through March 31) and spring flight stage (April 1 through June 30) of the pine shoot beetle's life cycle. **70 Fed. Reg. 32733 (June 6, 2005)**.

**PLANT QUARANTINE**. The APHIS has adopted as final regulations amending the plant health regulations by adding to 7 CFR Part 305 treatment schedules and related requirements that now appear in the Plant Protection and Quarantine Treatment Manual and by removing the Plant Protection and Quarantine Treatment Manual from the list of material that is incorporated by reference into the regulations. **70 Fed. Reg. 33263 (June 7, 2005)**.

# FEDERAL ESTATE AND GIFT TAXATION

**DISCLAIMERS**. The decedent owned an interest in an IRA which had the surviving spouse as the primary survivor beneficiary, a marital trust for the surviving spouse as the secondary beneficiary and a family trust, with the spouse as trustee, as the third beneficiary. The surviving spouse filed a timely written disclaimer of an undivided fractional interest in the IRA, a written disclaimer of the IRA property passing to the marital trust and a written disclaimer of the surviving spouse's limited power of appointment over the IRA property passing to the family trust. The IRS ruled that the disclaimers were all valid and effective. The IRS also ruled that the family trust would be considered a "see-through trust" under Treas. Reg. § 1.401(a)(9)-4 and the required minimum distributions would be determined using the life expectancy of the surviving spouse. **Ltr. Rul. 200522012, Feb. 14, 2005**.

**FAMILY-OWNED BUSINESS DEDUCTION**. The decedent's estate consisted primarily of real estate used in a family-owned business. The estate hired a CPA to prepare the estate tax return and the CPA determined that the estate was not eligible for the FOBD and did not make the deduction election on the filed return. However, on examination of the filed return, it was determined that the estate was eligible for FOBD and the estate sought an extension of time to file the election. The IRS granted the extension. **Ltr. Rul. 200521001, Feb. 2, 2005**.

**INSTALLMENT PAYMENT OF ESTATE TAX**. The decedent and spouse owned several residential and commercial rental properties and managed the properties with the help of 20 employees. The properties were owned by wholly-owned LLCs. After the decedent's death the properties were managed by the surviving spouse and the employees. The IRS ruled that the decedent's interests in the rental properties were interests in a closely-held business for purposes of I.R.C. § 6166 and the decedent's estate could elect to pay the estate tax attributable to the properties in installments. **Ltr. Rul. 200521014, Feb. 17, 2005**.

**TRANSFERS WITH RETAINED INTERESTS**. The decedent had owned several commercial properties when placed under a guardianship. The guardian and the decedent's heirs agreed to an estate plan for the decedent and the commercial properties were transferred to family limited partnerships with various heirs as partners and the decedent as general and limited partner. The estate plan provided for gifts of the decedent's partnership interests up to the annual exclusion amount. The court found that the parties had an agreement that all of the income from the partnerships would be available to the decedent during life; therefore, the decedent retained a right to the income from the partnerships and the partnerships were included in the decedent's estate under I.R.C. § 2036, except to the extent the decedent received money from the partnerships in exchange for the property transferred to the partnerships. **Estate of Abraham v. Comm'r, 2005-1 U.S. Tax Cas. (CCH) ¶ 60,502 (1st Cir. 2005), *aff'g*, T.C. Memo. 2004-39**.

The decedent had owned a condominium as a residence and entered into an agreement with the decedent's eight children that the decedent would transfer the condominium to the children with the understanding that the decedent would be able to continue to use the condominium as the taxpayer's residence without interference from the children. The agreement provided that the taxpayer would continue to be responsible for the costs of the condominium, including mortgage payments, taxes, association fees and maintenance. The decedent transferred interests in the condominium to the children in the three years before the decedent's death. The court held that the value of the condominium was included in the decedent's estate under I.R.C. § 2036(a)(1) because the decedent retained possession and enjoyment of the condominium after the transfers were made. **Tehan v. Comm'r, T.C. Memo. 2005-18**.

The decedent had owned a substantial amount of stock in two corporations and transferred the stock to two Delaware business trusts (DBTs). The court held that the stock was not included in the decedent's gross estate because the transfer was considered a bona fide sale for adequate consideration because (1) the stock was actually transferred to the DBTs; (2) the assets of the DBTs were not commingled with the decedent's personal assets; (3) the decedent had sufficient other assets to maintain the decedent's lifestyle; (4) the DBTs were formed by arm's-length negotiations; (5) the decedent's share of the DBTs were proportionate to the value of the stock; and (6) the formation of the DBTs furthered the decedent's goal to hold the stock for long-term investment, a sufficient non-tax purpose. **Estate of Schutt v. Comm'r, T.C. Memo. 2005-126**.

**VALUATION OF STOCK**. The IRS has announced its nonacquiescence in the following decision: The decedent owned a 49 percent interest in a corporation which operated a hair salon products business under the decedent's name. The Tax Court had valued the full company at fair market value with a discount for the loss of the decedent to the company. The Tax Court also discounted the value of the stock by 35 percent for a minority interest and lack of marketability. Finally, the Tax Court discounted the value of the stock by 15 percent because of a pending lawsuit. The appellate court reversed, holding that the Tax Court failed to provide sufficient support for the valuations and discounts applied in that the Tax Court did not require the IRS to prove its valuation. In the nonacquiescence, the IRS asserted that its valuation was entitled to a presumption of correctness. **Estate of Mitchell v. Comm'r, 250 F.3d 696 (9th Cir. 2001), *rev'g in part* , T.C. Memo. 1997-461, *nonacq.*, AOD 2005-01**.

# FEDERAL INCOME TAXATION

**AUDITS**. The IRS has issued an audit technique guide for examinations of veterinary practice businesses. The guide gives a description of the practice of veterinary medicine, industry tax issues, examination techniques, and a number of exhibits that list supporting laws, industry organizations and web sites of interest. **MSSP Veterinary Audit Technique Guide (04-2005), IRPO ¶ 219,101**.

The IRS has issued an audit technique guide for examinations of partnerships. **MSSP Audit Techniques Guide: Partnerships (Revised 12/2004)**.

**BUSINESS ENTERTAINMENT EXPENSES. The** IRS has issued guidance on the personal use of business aircraft for entertainment travel. The guidance explains how to apply the limitation under I.R.C. § 274(e) on the amount that a business can deduct when a company officer, director, or more than 10 percent owner uses the company's aircraft for entertainment travel. The statutory limitation restricts the amount that a business can deduct to the amount that the employee/recipient actually takes into income for use of the aircraft. The notice clarifies who is covered by the limitation, describes the relevant costs and illustrates the allocation of the costs for an entertainment flight. **Notice 2005-45, I.R.B. 2005-24**.

**BUSINESS LOSSES**. The taxpayer was a corporation which operated an automobile dealership. The corporation was wholly-owned by one person who decided to expand the business to include classic vintage cars. The cars were purchased and restored to mint condition before being offered for sale. The taxpayer advertised the cars for sale and displayed the cars in vintage car shows and competitions. The taxpayer claimed the income from the cars as ordinary income and losses from the car sales as ordinary losses. The IRS argued that the cars were purchased as investments with only capital losses allowable. The court used the factors of *Willford v. Comm'r, T.C. Memo. 1992-450* to hold that the taxpayers held the cars for sale in the ordinary course of business and was entitled to deduct the losses as ordinary losses (1) the sales of the cars were as frequent as reasonably to be expected for the classic sales market; (2) most of the profits came from the restoration of the cars and not from mere appreciation over time; (3) the cars were not held by the taxpayer for a time longer than reasonably expected for the sales; (4) the taxpayer purchased the cars with the intent to resell them; (5) the taxpayer spent substantial effort to advertise and market the cars; and (6) the taxpayer spent substantial amount of time to the selling of the cars. **David Taylor Enterprises, Inc. & Subsidiaries v. Comm'r, T.C. Memo. 2005-127**.

**CHARITABLE DEDUCTIONS**. The IRS has issued interim guidance on the deductibility and substantiation requirements relating to charitable contributions of qualifying vehicles. No charitable deduction is allowed under I.R.C. § 170(a) for the contribution of a qualified vehicle with a claimed value in excess of $500 unless the donor substantiates the contribution by contemporaneous written acknowledgment. Generally, the deduction for donated vehicles is limited, with certain exceptions, to the actual sale price of the vehicle when it is sold by the charity. The new guidance adds another exception to this rule, allowing the donor to claim a fair market value (FMV) deduction in cases where the charity either gives or sells the vehicle at a low price to a needy individual, provided this transfer furthers the charity's purpose of helping a poor person in need of a means of transportation. Furthermore, guidance is provided with respect to determining FMV and the timelines for substantiation of such a charitable contribution. This interim guidance applies to contributions made on or after January 1, 2005, and until regulations become effective. **Notice 2005-44, I.R.B. 2005-25**.

**DISCHARGE OF INDEBTEDNESS**. The taxpayers filed for Chapter 7 bankruptcy with the estate consisting of a business debt owed to the taxpayer and two properties secured by mortgages. After the bankruptcy filing, the business debt became worthless, the automatic stay was lifted as to the two properties and the properties were sold for less than the lenders' claims. The lenders did not file a claim for the deficiencies in the bankruptcy case. The taxpayer did not include the discharged deficiencies in income but claimed a net operating loss from the worthless business debt. The court held that the deficiencies were discharged in the bankruptcy case, resulting in income to the taxpayer which offset the net operating loss from the worthless business debt. The appellate court affirmed in an opinion designated as not for publication. **Johnson v. Comm'r, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,396 (5th Cir. 2005), *aff'g*, T.C. Memo. 2004-37**.

**IRA**. The taxpayer had an IRA with a bank and received an early distribution from that IRA. The taxpayer attempted to reinvest the funds in three other IRA accounts but the new trustee failed to properly establish the IRAs; thus, the funds were placed in ordinary savings accounts. The error was not discovered until more than 60 days had passed since the initial distribution and the taxpayer requested a waiver of the 60 day rollover period. The IRS granted the request. **Ltr. Rul. 200521033, Feb. 14, 2005**; **Ltr. Rul. 200521034, March 4, 2005**.

The taxpayer was married and filed a joint return with the spouse. The taxpayer was a participant in an employer-sponsored retirement plan and also made contributions to an IRA. Because the taxpayer was a participant in a retirement plan, the IRS contribution deduction was subject to reduction by the amount of the taxpayer's gross income over $53,000, I.R.C. § 219(g)(2)(A), (3)(B)(i). The taxpayer deducted the contribution to the IRA based on the taxpayer's calculation of the limitation on the IRS deduction using only taxpayer's individual gross income of $61,000 and not the combined gross incomes of the taxpayer and spouse of $124,000. The court held that the calculation of the limitation on IRA contribution deductions had to be made with the combined gross income of the taxpayer and spouse since they filed a joint return. **Ho v. Comm'r, T.C. Memo. 2005-133**.

**INSTALLMENT METHOD OF REPORTING**. The taxpayer was an S corporation which sold property under an installment agreement. The taxpayer hired an accounting firm to prepare the income tax returns. The accounting firm determined that the sale was not eligible for installment reporting of the gain and filed the return with all the gain reported as current income. The taxpayer hired another accounting firm which reviewed the return and determined that the transaction was eligible for installment reporting. The taxpayer sought permission to revoke the election out of the installment method of reporting the gain from the sale. The IRS granted permission to revoke the election. **Ltr. Rul. 200521007, Feb. 25, 2005**.

**INTEREST RATE**. The IRS has announced that, for the period July 1, 2005 through September 30, 2005, the interest rate paid on tax overpayments continues to be 6 percent (5 percent in the case of a corporation) and for underpayments continues to be 6 percent. The interest rate for underpayments by large corporations continues to be 8 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 continues to be 3.5 percent. **Rev. Rul. 2005-35, I.R.B. 2005-24.**

**LIKE-KIND EXCHANGES**. A testamentary trust exchanged property intended to qualify as a like-kind exchange for purposes of I.R.C. § 1031; however, under the terms of the trust, the trust was scheduled to terminate within a short period after the exchange and distribute its property to the beneficiaries. The IRS ruled that the pre-determined termination of the trust did not affect the eligibility of the exchange for Section 1031 like-kind exchange treatment. **Ltr. Rul. 200521002, Feb. 24, 2005**.

**PARTNERSHIPS**

CLASSIFICATION**.** The taxpayer was the sole owner of a limited liability company which operated a nursing home. The company did not make the election to be taxed as a corporation under the "check-the-box" regulations, Treas. Reg. §§ 301.7701-1 through 3. The IRS levied against the taxpayer's property to collect employment taxes owed by the company. The taxpayer argued that the levy was improper because the taxes were owed by the company and not the taxpayer. The taxpayer argued that the "check-the-box" regulations were invalid because they exceed the statutory authority of the IRS. The court held that the regulations were a valid interpretation of the statute and provided taxpayers with beneficial flexibility in determining the taxation of their small companies. The court held that the taxpayer was personally liable for the company's employment taxes since the taxpayer did not elect to have the LLC taxed as a corporation. **Littriello v. United States, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,385 (W.D. Ky. 2005)**.

**PENSION PLANS**. For plans beginning in June 2005 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the corporate bond weighted average is 5.94 percent with the permissible range of 5.35 to 5.94 percent (90 to 100 percent permissible range). The 30-year Treasury securities rate for this period is 5.00 percent, the 90 percent to 105 percent permissible range is 4.50 percent to 5.25 percent, and the 90 percent to 110 percent permissible range is 4.50 percent to 5.50 percent. **Notice 2005-46, I.R.B. 2005-24**.

**S CORPORATIONS**

SHAREHOLDER. The taxpayer had purchased a 50 percent share in an S corporation but decided to sell the shares to the other shareholder in 2001. The other shareholder failed to obtain a loan for the buyout but the taxpayer ceased all activities with the corporation or its business. In October 2001, the parties reached an agreement for the sale of the shares and the taxpayer received a partial payment in cash with the remainder to be paid as soon as financing was arranged. In 2002, the taxpayer agreed to a smaller lump sum payment. The taxpayer did not include any share of the corporation's income for 2001, although the corporation filed a Form K-1 allocating 50 percent of the corporation's 2001 income to the taxpayer. The taxpayer argued that the taxpayer's share was terminated in April 2001 when the taxpayer ceased activities with the corporation and agreed to sell the shares to the other shareholder. The court held that the best evidence that the taxpayer's interest in the corporation ceased was the October 2001 sales agreement and payment of the cash; therefore, the taxpayer's share of corporation income for the first 10 months of 2001 was included in the taxpayer's income for 2001. **Mullins v. Comm'r, T.C. Summary Op. 2005-72**.

**TRAVEL EXPENSES**. The taxpayer was a self-employed computer consultant who owned a residence in Colorado. During the tax year involved, the taxpayer was hired by a company in Australia to perform temporary computer consulting activities.

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The taxpayer contracted with a property management company to rent the Colorado residence while the taxpayer lived and worked in Australia. The court held that the taxpayer failed to establish that the business had a permanent home in Colorado; therefore, the taxpayer "carried" the taxpayer's residence to Australia and could not deduct travel expenses to and from Australia. **Verity v. Comm'r, T.C. Memo. 2005-70**.

## NEGLIGENCE

**DAMAGES**. The plaintiff farmer ordered the same corn seed from the defendant as was purchased in the previous year but the delivered seed was of a shorter harvest period than the previous seed. The plaintiff discovered the error because the new seed was planted next to seed saved from the previous year. The plaintiff notified the defendant when the new crop tassled much earlier than expected and the defendant told the plaintiff to harvest the corn and the defendant would "settle" the problem at harvest. The plaintiff sued for the lost production because the shorter period corn was not suitable for use in the area. The plaintiff claimed damages based on the total production for the new and old seed as compared to the previous year when all old seed was used. The defendant argued that the damages should have been calculated using only the comparison of the production of the defective seed, and, because the plaintiff failed to segregate the harvested corn, the damages were not proved by the plaintiff. The court upheld the jury award of damages based on the total production comparison because the defendant never required the plaintiff to separate the harvested corn. **Matt v. Agro Distribution, LLC, 2005 La. App. LEXIS 1428 (La. Ct. App. 2005)**.

**OPEN AND OBVIOUS DANGER.** The plaintiff's son was killed while assisting the defendant in repairing the front-end loader on a tractor owned by the plaintiff. The defendant was using the tractor on the defendant's property when the accident occurred. The plaintiff sued for ordinary negligence and premises liability. The defendant argued that the defendant's liability was precluded by the open and obvious danger of repairing the front-end loader. The court held that the doctrine of open and obvious dangers did not apply to ordinary negligence claims but did apply to premises liability claims. The trial court had granted summary judgment to the defendant based on the son's knowledge of farm machinery and the danger of repairing a front-end loader while it was raised. The court held that the trial court applied the wrong standard as to the knowledge of the danger, holding that the court should have used the knowledge of a "reasonably prudent person" as to the dangers and not the plaintiff's son's knowledge. **Laier v. Kitchen, 2005 Mich. App. LEXIS 1274 (Mich. Ct. App. 2005)**.

## SECURED TRANSACTIONS

**LEASE VERSUS SALE.** The parties entered into two nearly identical "leases" of dairy cows. The first lease involved 122 cows and the second 90 cows. Each lease provided for a term of 50 months with two regular monthly lease payments, two small monthly lease payments, and 46 regular monthly lease payments. The leases allowed the lessee to purchase the leased cows for approximately three lease payments. The leases required the lessee to replace any lost cows and the lease covered any offspring of the original cows. The court stated that U.C.C. § 1-201(37) as enacted in Illinois and Kansas, created a *per se* sale rule if (1) the lease cannot be terminated by the lessee and (2) the leased property can be purchased for a nominal price. Both parties agreed that the leases did not allow the lessee to terminate the leases, but the parties disagreed as to whether the option to purchase price was nominal. The court found that the option purchase price was nominal because the price was about 6 percent of the total lease payments, the lessee was required to replace lost animals and the offspring became leased property. The court stated that "only a fool" would fail to exercise the purchase option after spending so much on the cows and lose the benefit of new offspring and replacement cows. The court also cited the factors of (1) the lessee was required to bear all maintenance costs, including insurance, taxes, and veterinary care and (2) the cattle did not initially belong to the lessor but were purchased from a third party. ***In re* Buehne, 321 B.R. 239 (Bankr. S.D. Ill. 2005)**.